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No. 125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

WALTER E. CARR, DIRECTOR OF IMMIGRATION OF THE UNITED STATES FOR THE LOS ANGELES DISTRICT, No. 31,

Petitioner,

versus

MATEO ZAJA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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The Daily Record Co. Print, Baltimore.

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OPINIONS BELOW.

The District Court ordered respondent discharged from custody on the authority in Nagle, etc., vs. Hansen, 17 Fed. (2d) 557, (R. 9). The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 37 F. (2d) 1016.

STATEMENT OF THE CASE.

Presumably the records of the Immigration Service have been filed with the Clerk of the Supreme Court as an original exhibit. (See Stipulation, R. 12.) They will be referred to throughout this brief as "Immigration

File." The printed transcript of the proceeding in the Circuit Court will be referred to as "Transcript of Record."

The facts in this case are simple and undisputed. The immigration file discloses that Mateo Zaja, a Dalmatian, last entered the United States as a deserting seaman on January 21, 1925. He had been a sailor all his life. He had left his native country in 1924 on a cruise to South America, and from that place shipped on the S. S. Levenza enroute to Trieste, Italy, at which time he had no intention of leaving the ship, in the United States. (Immigration File, Preliminary Hearing, October 9, 1928, pp. 1 and 2.)

When the boat arrived at San Pedro enroute to Trieste, Mateo Zaja deserted the ship because he did not like an Italian boat and because he did not want to go back to Trieste. At that time he intended to catch another ship at San Pedro. (Immigration File, Hearing of October 22, 1928, p. 5.)

Since his arrival in the United States, he has never been out of this country, save and except as the member of the crew of fishing boats in local waters. (Immigration File, Hearing of October 22, 1928, p. 3.) During his stay in this country he has worked regularly as a seaman on fishing boats, except for a short period of time while he was in the hospital and for a short time while he had a job digging ditches during the off season.

Mateo Zaja was taken into custody by the United States Immigration Service on the 4th day of October, 1928, having been at that time in this country continuously for a period in excess of three years and eight months.

The charge upon which Mateo Zaja was tried by the Immigration Service, and the finding of that Service upon which the warrant of deportation is based, is as follows:

> "Has been found in the United States in violation of the United States Immigration Act approved May 26, 1924, for the reason that he remained in the United States for a longer time than permitted under said act or regulations made thereunder."

Mateo Zaja then sued out a writ of habeas corpus in the District Court for the Southern District of California. Upon this writ he was released from custody. On appeal, the Circuit Court of Appeals for the Ninth Circuit affirmed the order of the District Court, holding that the deportation of Mateo Zaja was barred by virtue of the three-year statute of limitations contained in Section 34 of the Immigration Act of February 5, 1917 (8 U. S. C. 166), following the former decision of that court in *Nagle vs. Hansen*, 17 Fed. (2d) 557.

SUMMARY OF ARGUMENT.

Deportation of the respondent is barred by the three year limitation period set out in Section 19 and Section 34 of the Immigration Act of 1917 (8 U. S. C. 155 and 166). That the provisions of the Immigration Act of 1924 are in addition to and not in substitution of the Immigration Laws of 1917 and do not repeal any of the provisions of the 1917 Act not expressly repealed.

That the question in this case has become moot in so far as this respondent is concerned by the failure of the petitioner to stay mandate of the Circuit Court of Appeals within time prescribed by Rule 32 of the Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT.

I.

THE RESPONDENT'S DEPORTATION WAS NOT AUTHORIZED IN VIEW OF SECTION 19 AND SECTION 34 OF THE IMMIGRATION ACT OF 1917.

Having resided for more than three continuous years in the United States prior to the institution of the deportation proceedings, respondent contends that his deportation is barred by the provisions of Section 19 and Section 34 of the Immigration Act of 1917 (8 U. S. C. 155 and 166).

Section 34 of the Immigration Act of February 5, 1917 (8 U. S. C. 166), provides:

> "That any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation for this act as provided in section twenty of this act."

Section 14 of the Immigration Act of 1924, which petitioner contends repeals Section 34 of the 1917 Act, reads as follows:

> "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported * * *."

The most elemental rules of statutory construction establish that Section 34 of the Act of 1917 is in full force and effect. First of all, it should be noted that there is no express repeal. If there is any repeal at all it is a repeal by implication. However, it is a fundamental rule of statutory construction that a later statute will not repeal a prior statute unless they are clearly inconsistent and cannot be reconciled. Such is not the case here. Section 34 of the Immigration Act of 1917 deals with a certain, definite, special class, while Section 14 of the Immigration Act of 1924 is a general statute and does not apply to the special class created by the Act of 1917.

Respondent's argument in this regard is perhaps best set forth in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Nagle vs. Hansen*, 17 Fed. (2d) 557, the following excerpt from which is particularly applicable and determinative of the contentions made by petitioner in this regard:

Page 558:

"(2, 3) The second question is as to whether section 14 of the Immigration Act of 1924 repeals section 34 of the Act of 1917. The general provision in the 1924 Act that aliens, who have entered unlawfully or remained illegally 'at any time after entering the United States,' shall be taken into custody and deported, is inconsistent with the provisions of section 34 of the Act of 1917, and would suggest a repeal of the latter by implication, unless section 34 may be said to create a special class, subject to special and different treatment. And, considering it in the relation it bears to other provisions of the Act of 1917, we think it does create a special limitation, in favor of seamen as a class, which is not repealed by the 1924 Act. The Act of 1917 contained a general provision (section 19 (Comp. St. par. 4289¼jj)) governing the deportation of aliens, the provision com-

mon to those who entered while belonging to excluded classes being that they might be deported within five years after entry. That this provision, as it affects all aliens not within the admissible classes, was repealed by section 14 of the Act of 1924 seems clear enough. That repeal, however, in reason and relation, does not affect the special conditions, separately expressed in section 34 of the 1917 law.

"Point is given to this argument that seamen are to be favored under the law when it is considered that the Naturalization Act provides for the admission to citizenship of men who have 'served for three years on board merchant or fishing vessels of the United States' (section 4, subd. 7, Act June 29, 1906, 34 Stat. 596, as amended (Comp. St. par. 4352 (7))), and that after such period of service, and after filing a declaration of intention to become a citizen, such seaman 'shall be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States, anything to the contrary in any act of Congress notwithstanding' (Sub-division 8 (Comp. St. par. 4352 (8))). The privilege of becoming a citizen in such cases seems to depend upon service for the three-year period on American ships only, and is not further conditioned upon a showing that the applicant during such service belonged to a non-excluded class. It may well be assumed that this legislation is cognate with that relating to immigration, for the fixing of a three-year period of service on American ships as a minimum requirement to citizenship, which carries the seaman beyond the deportation period fixed in section 34 referred to, seems hardly a mere coincidence."

At this point, it should be noted that the only charge upon which Mateo Zaja was ordered deported is in substance that he remained in the United States for a longer time than permitted under the Immigration Act of 1924,

or the regulations made thereunder. If it could be shown that Mateo Zaja was permitted to enter the United States under the 1924 Act for any period of time and had overstayed that time, the three-year limitation laid down in Section 34 of the Immigration Act of 1917 (8 U. S. C. 166) would nevertheless apply. But we emphasize the point that in the case at bar, there is no evidence nor contention that Mateo Zaja ever entered pursuant to any of the provisions of the 1924 Act. It is undisputed that he entered the United tSates illegally and unlawfully by deserting a ship and thus surreptitiously gaining an entry into this country. We challenge petitioner to show any provisions of the 1924 Act laying down any particular time within which such an entrant must depart. To be sure, there are certain provisions of the 1924 Act requiring some aliens to depart from this country within certain periods. With regard to seamen, Sections 3, 15 and 19 of the Immigration Act of 1924, must be considered as well as Section 14.

Section 15 (8 U. S. C. 215) provides:

> "The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

Clause 5 of Section 3 (8 U. S. C. 203) there referred to is as follows:

> "When used in this act the term 'Immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman. * * *"

Thus, an alien seaman being a non-immigrant is not required to observe the quota and visa provisions of the 1924 Act. Section 19 (8 U. S. C. 166) authorizes the Secretary of Labor to make regulations for the admission of alien seamen and in part provides:

> "No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States."

By virtue of the foregoing provisions, the Secretary of Labor promulgated Immigration Rules of July 1, 1925. Rule 6, subdivision 1, paragraph 1 (set out in full in Petitioner's Brief, p. 23), provides in part:

> "Any alien who shall come to a United States port as a seaman and land in the United States otherwise than in pursuance of and in accordance with the provisions of the act of February 5, 1917, shall be arrested, as provided in section 34 of said act, whenever and wherever found in this country *within three years from the date of landing. . .*" (Italics ours.)

It is, therefore, apparent that the Secretary of Labor in 1925, recognized that regulations affecting alien seamen, promulgated pursuant to the authority conferred upon him by the provisions of the Immigration Act of 1924, were, nevertheless, limited by the provisions of Section 34 of the Act of 1917, and that this Section was not repealed by the Act of 1924.

In fact, the petitioner admits that Section 34 of the 1917 Act was not intended to be repealed by Congress. (Petitioner's Brief, p. 15).

Some decisions have held that the effective date of the 1924 Act is the test and that seamen entering the country after the effective date of the 1924 act entered under that Act. (Rios vs. Day, 24 F. (2d) 654, and later decisions of the Second Circuit.) It is argued by the respondent that an alien seaman does not enter the United States under the Act of 1924 or under any other Act, but enters the country subject to all the Immigration Laws of the United States in force at the time of his entry. At the time of this respondent's entry the laws affecting him were the Immigration Laws of 1917 as modified by the Act of 1924. In fact, the Act of 1924, Section 25, provides that its provisions are, "in addition to and not in substitution for the provisions of the Immigration Laws." It is therefore clear that it is erroneous to say that Section 34 of the Act of 1917 can only affect seamen entering the country prior to the effective date of the 1924 Act.

But, in so far as Mateo Zaja is concerned it is an entirely different matter. He did not enter pursuant to Section 19 of the Act of 1924 or under any regulation of the Secretary of Labor. He was not permitted to enter—he was a deserter. After his entry he never abandoned

his calling as a seaman. In this regard we direct the Court's atention to the opening language of Section 34 of the 1917 Act:

> "That any alien seaman who shall land in a port of the United States *contrary* to the provisions of this act, etc."

Some decisions have held that the limitation applies only to alien seamen coming in contrary to the laws and regulations. This distinction was indicated in the case of *Ex parte Bildt*, 32 Fed. (2d) 894, at page 895, as follows:

> "The language of the 1917 Act is: 'That any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody,' etc.
>
> The difficulty of application arises out of the fact that the initial 'landing' of the appellant was not unlawful but pursuant to permission duly given by the immigration officials."

See also:

Cellamare vs. Day, 32 Fed. (2d) 623.

Thus, it would seem that there is a distinction between seamen who are permitted to land temporarily, pursuant to the provisions of Section 19 of the 1924 Act, and seamen who surreptitiously enter the United States. As to the latter class undoubtedly the three year period laid down in Section 34 of the 1917 Act controls.

But we contend that the limitation period applies to all seamen who have entered lawfully or unlawfully and who have remained for more than three years. This question will doubtless be covered thoroughly in the case of

Phillippides vs. Day, Commissioner, now pending before this Court as No. 92, October term, 1930. We will simply indicate several salient points in connection with this theory.

An examination of the Committee Report (House Reports of Congress Nos. 350, 688 and 716, 68th Congress, 22d Session), indicate that Congress did not intend to repeal the provisions of Section 34 of the 1917 Act and that Congress considered that this provision applied to all seamen entering the country.

Furthermore, the codifiers of the 1926 United States Anotated Code, appointed by Congress, in drafting Section 166 of title 8, amalgamated the provisions of Section 34 of the 1917 Act with the provisions of Section 19 of the 1924 Act and provides:

> "No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States. Any alien seaman who shall land in a port of the United States contrary to the provisions of this subchapter shall be deemed to be unlawfully in the United States, and shall, *at any time within three years thereafter,* upon the warrant of the Secretary of Labor be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation provided in section 156 of this title (Acts of February 5, 1917, Chapter 29, Section 34, 39 Stat. 896; May 26, 1924, Chapter 190, Section 19, 43 Stat. 164)."

II.

THE QUESTION INVOLVED ON THIS APPEAL HAS BECOME MOOT.

An examination of the Transcript of Record (page 15) will disclose that the Opinion and Decree of the Circuit Court for the Ninth Circuit was filed on February 17, 1930. Pursuant to the authority vested in that Court by the provisions of Title 28, Section 350, of the United States Code, that Court, by Rule 32 (certified copy of which has been filed with the Clerk of the Supreme Court) provides a thirty day stay of execution before mandate is sent to lower Court.

The Record will further disclose that no petition for further stay of the mandate was ever filed. Therefore, at the expiration of the thirty day period provided for in Rule 32, the Circuit Court of Appeals for the Ninth Circuit issued its mandate to the District Court of the United States, in and for the Southern District of California. That mandate was in due course forwarded to said District Court, spread on its minutes, and Mateo Zaja thereupon duly discharged from custody, as is evidenced by certified copy of the minute order of said Court, also on file with the Clerk of the Supreme Court. (Rule 32 above referred to and certified copy of minute order are set out in Appendix, *infra*, p. 14.)

The judgment and decree of the Circuit Court for the Ninth Circuit was fully carried out. Petitioner, if he had chosen to stay the execution of that judgment could have applied for a further stay of the execution. Having failed to do so, the judgment was executed.

CONCLUSION.

The decree of the Circuit Court of Appeals for the Ninth Circuit should be affirmed and the Writ dismissed.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX.

RULE 32 OF THE RULES OF PRACTICE OF UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit.

CERTIFICATE OF CLERK OF U. S. CIRCUIT COURT OF APPEALS TO RULE 32 OF THE RULES OF PRACTICE OF THIS COURT.

I, PAUL P. O'BRIEN, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the following is a full, true and correct copy of Rule 32 of the Rules of Practice of this Court, adopted June 27, 1928, and now in full force and effect:

RULE 32.

MANDATE

In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall, upon the payment of any costs due in the case, be issued, as of course from this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of 30 days from the date of such final determination, unless within said time a petition for re-

hearing be filed, in which case the mandate shall be stayed until 5 days after the determination of such petition.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, this 28th day of October A. D. 1930.

PAUL P. O'BRIEN,

(Seal.) Clerk.

CERTIFIED COPY OF MANDATE OF THE CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, IN THE MATTER OF THE PETITION OF MATEO ZAJA FOR A WRIT OF HABEAS CORPUS.

No. 9630-M.

United States District Court
Southern District of California
Central Division

IN THE MATTER OF THE PETITION OF MATEO ZAJA FOR A WRIT OF HABEAS CORPUS.

Certified Copy of Minute Order 3-24-30 and Mandate.

At a stated term, to wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern

District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 24th day of March, in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable Wm. P. James, District Judge.

In the Matter of the Petition Of Mateo Zaja for a writ of Habeas Corpus. } No. 9630-M. Crim.

Upon motion of Theo. E. Bowen, Esq., it is ordered that Mandate of the Circuit Court of Appeals, affirming order of the District Court, be filed and spread upon the minutes of this court, the said Mandate, as filed, being as follows, to-wit:

(Seal)

United States of America, ss:

The President of the United States of America

To the Honorable the Judges of the District Court of the United States for the Southern District of California, Central Division,

GREETING:

Whereas, lately in the District Court of the United States for the Southern District of California, Central Division, before you, or some of you, in the Matter of the petition of Mateo Zaja for a writ of habeas corpus, No. 9630-M Crim., an Order was duly entered on the 9th day of August, A. D. 1929, which said Order is of record and fully set out in said matter in the office of the clerk of the said District Court, to which record reference is hereby

made and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Walter E. Carr, Director of Immigration of the United States for the Los Angeles District, No. 31, as appellant, against Mateo Zaja, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the 12th day of February in the year of our Lord One Thousand Nine Hundred and Thirty the said cause came on to be heard before the said Circuit Court of Appeals on the said Transcript of Record and was duly argued and submitted.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

(February 17, 1930)

YOU, THEREFORE, ARE HEREBY COMMANDED that such further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable CHARLES EVANS HUGHES Chief Justice of the United States, the 19th day of March, in the year of our Lord One Thousand Nine Hundred and Thirty and of the Independence of the United States of America the One Hundred and Fifty-fourth.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed) No. 6026 United States Circuit Court of Appeals For The Ninth Circuit WALTER E. CARR, District Director of Immigration, etc., vs. MATEO ZAJA, MANDATE No. 9630-M Cr. U. S. District Court, Southern District of California, Central Division, FILED MAR. 24 1930 R. S. ZIMMERMAN, Clerk by Murray E. Wire, Deputy Clerk.

District Court of the United States
Southern District of California
Central Division.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA } *ss:*

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of an original minute order made and entered on March 24th, 1930, in the Matter of the Petition of Mateo Zaja for a writ of Habeas Corpus, No. 9630-M Criminal, Central Division, and a full true, and correct copy of Mandate of the Circuit Court of Appeals filed in said case and spread upon the minutes of this court, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 27th day of May, A. D. 1930.

R. S. ZIMMERMAN,
(Seal) Clerk.

By Edmund L. Smith,
Deputy Clerk.